

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TAMMIE L. MURRAY,
Plaintiff,
v.
DEPARTMENT OF CONSUMER and
BUSINESS SERVICES, JOHN MARK
MILLS, ALJ-WCB, JUDITH K.
ANDERSON, DOJ-AAG, STEPHEN A.
ROBERTS, SSCO-OR-OSHA,
Defendants.

No. CV-09-1292-HU

FINDINGS & RECOMMENDATION

Tammie L. Murray
82270 Red Bluff Road
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Plaintiff Pro Se

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Pro se plaintiff Tammie Murray brings this action against
3 defendants the Department of Consumer and Business Services ("the
4 Department"), Administrative Law Judge (ALJ) John Mark Mills,
5 Assistant Attorney General Judith Anderson, and Oregon Occupational
6 Safety and Health (OR-OSHA) Senior Safety Compliance Officer
7 Stephen Roberts.

8 Presently, defendants move to dismiss plaintiff's First
9 Amended Complaint. Plaintiff moves for leave to file a Second
10 Amended Complaint. I recommend that defendants' motion be granted
11 and that plaintiff's motion be denied.

12 BACKGROUND

13 The case has its origin in a February 16, 2007 citation issued
14 by Roberts to Murray & Sons, charging Murray & Sons \$5,000 for a
15 "serious repeat violation of a prior fall citation." Attchmt 1 to
16 Affid. of Andrew Hallman at p. 1. Murray & Sons contested the
17 citation and a hearing on the matter was conducted by ALJ Mills on
18 January 10, 2008, and June 20, 2008. Anderson was the attorney
19 representing OR-OSHA, Roberts was the OR-OSHA representative at the
20 hearing, and plaintiff, as the president of Murray & Sons,
21 represented her company. In a nine-page decision issued November
22 4, 2008, ALJ Mills approved the citation.¹

23
24 ¹ Although plaintiff does not attach a copy of ALJ Mills's
25 decision to the First Amended Complaint, she makes repeated
26 references to it and the contents of ALJ Mills's decision
27 provides the basis for some of plaintiff's claims. In such
28 circumstances, the district court may consider material outside
the pleadings in resolving a motion to dismiss. E.g., Branch v.
Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (document is not
considered "outside the pleading" for purposes of Rule 12(b) "if

1 Generally, plaintiff contends that her rights were violated in
2 connection with the hearing and ALJ Mills's decision. She alleges
3 that the proceeding was unconstitutional and based on lies. She
4 further alleges that the proceeding resulted in a "slanderous"
5 Opinion & Order by Mills.

6 The First Amended Complaint does not coherently set forth
7 relevant background facts and claims. Rather, it is an amalgam of
8 narrative assertions, untethered legal claims, and legal argument.
9 Nonetheless, I attempt to set forth here the major contentions as
10 they are alleged.

11 Plaintiff raises several allegations against all defendants,
12 including the Department. She contends that defendants required
13 her to participate in unconstitutional proceedings as the only
14 means to challenge the citation. First Am. Compl. at p. 2.
15 Defendants, all members of the executive branch, are alleged to
16 have formed a "collusive agreement" to deny plaintiff due process
17 and equal protection. Id. at pp. 2-3. Defendants' actions
18 violated the separation of powers in both the United States and
19 Oregon Constitutions. Id. at p. 3. Defendants made claims in the
20 proceeding that were not supported by fact causing personal injury
21 of "mind and emotion" and irreparable harm to plaintiff's
22 reputation and future earnings. Id. Defendants allegedly took
23 property that they did not have a right to take. Id. at p. 4.

24
25 the complaint specifically refers to the document and if its
26 authenticity is not questioned"), overruled on other grounds,
27 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.
28 2002). ALJ Mills's decision, which describes the citation, is
appended to the Affidavit of Andrew Hallman.

1 Defendants' "collusive agreement" was meant to defeat the purpose
2 of the United States and Oregon Constitutions because "the Oregon
3 Executive branch in this instance cannot be the rule maker, the
4 accuser, and the referee to diminish any person's rights under
5 separation of powers." Id. In violation of the Oregon
6 Constitution, the proceedings did not allow for a jury trial. Id.

7 As to ALJ Mills individually, plaintiff contends that he
8 failed to reopen the record to hear evidence of perjury. Id. at p.
9 5. ALJ Mills "avoided" plaintiff's closing argument in his Opinion
10 & Order and attempted to "cover-up" the perjury and false swearing.
11 Id. at p. 5. ALJ Mills was allegedly prejudiced against plaintiff
12 in her representation of her company and used blasphemy toward
13 plaintiff. Id. He libeled plaintiff in the Opinion & Order. Id.
14 at pp. 5-7.

15 As to Anderson individually, plaintiff alleges that she failed
16 to investigate evidence of Roberts's alleged perjury and false
17 swearing, she ignored the crime of perjury, and made
18 misrepresentations at the hearing. Id. at pp. 8-9. She allegedly
19 made untrue statements. Id. Anderson denied plaintiff due process
20 and equal protection under the United States Constitution. Id.

21 As to Roberts individually, plaintiff alleges that Roberts
22 libeled and defamed her at the June 20, 2008 hearing. Id. at p.
23 10. She contends that Roberts committed perjury at the hearing.
24 Id. She alleges that Roberts concealed facts from her that were
25 pertinent to her representation of her company. Id. at p. 12.

26 Sprinkled throughout her factual allegations, plaintiff makes
27 reference to the following "legal" claims: Articles I-III of the
28 United States Constitution and the Fourteenth Amendment of the

1 United States Constitution; 28 U.S.C. §§ 1331, 1343; 42 U.S.C. §§
 2 241, 242, 1983, 1985; denial of due process and equal protection
 3 under the United States Constitution; violation of the Oregon
 4 Constitution and "separation of powers" by the defendants'
 5 "collusive agreement"; property being taken in "unconstitutional
 6 proceedings"; common law claims of misrepresentation of fact,
 7 libel, and defamation; and perjury and false swearing. First Am.
 8 Compl. at pp. 2, 3, 4, and *passim*.

9 In the formal recitation of her claims, plaintiff's First
 10 Claim for Relief seeks a permanent injunction "to remove all
 11 described passages herein by all Defendants be blocked out, deleted
 12 from, and erasures of the CDR recording passages view or audio
 13 within any public record held by the state of Oregon, and any other
 14 passages similar in content to the many mentioned herein." *Id.* at
 15 p. 12. In her Second Claim for Relief, plaintiff seeks a permanent
 16 injunction ordering the removal of ALJ Mills's November 4, 2008
 17 Opinion & Order from the internet and any public record. *Id.* at p.
 18 13. In her Third Claim for Relief, plaintiff seeks relief for her
 19 injuries, and prays for damages in the amount of \$1,500,000. *Id.*
 20 at p. 14.

21 STANDARDS

22 On a motion to dismiss, the court must review the sufficiency
 23 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
 24 All allegations of material fact are taken as true and construed in
 25 the light most favorable to the nonmoving party. American Family
 26 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120
 27 (9th Cir. 2002). However, the court need not accept conclusory
 28 allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121

1 (9th Cir. 1992).

2 A motion to dismiss under Rule 12(b)(6) will be granted only
3 if plaintiff alleges the "grounds" of his "entitlement to relief"
4 with nothing "more than labels and conclusions and a formulaic
5 recitation of the elements of a cause of action[.]" Bell Atlantic
6 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation
7 omitted). "Factual allegations must be enough to raise a right to
8 relief above the speculative level, . . . on the assumption that
9 all the allegations in the complaint are true (even if doubtful in
10 fact)[.]" Id. at 1965 (citations and internal quotations omitted).

11 DISCUSSION

12 Defendants make several arguments in support of their motion:
13 (1) the state law claims against the individual defendants must be
14 dismissed and the State of Oregon substituted as the defendant; (2)
15 the state law claims must be dismissed because plaintiff cannot sue
16 the State of Oregon for damages in federal court under the Eleventh
17 Amendment; (3) ALJ Mills is entitled to absolute immunity for
18 acting in his role as a judge; (4) Anderson is entitled to absolute
19 immunity for acting in her role as a prosecutor; (5) all individual
20 defendants are entitled to absolute immunity for statements made in
21 the course of a judicial proceeding; (6) plaintiff fails to state
22 a claim for defamation under section 1983; (7) plaintiff's
23 remaining allegations of constitutional violations are not based on
24 a cognizable legal theory and fail to include sufficient facts to
25 form a cognizable legal theory; (8) plaintiff's claims are barred
26 by res judicata because Murray & Sons failed to seek judicial
27 review of ALJ Mills's Opinion & Order; (9) plaintiff's claims are
28 barred by the Rooker-Feldman doctrine. I address the arguments in

1 turn.

2 I. Substitution of State of Oregon

3 Under the Oregon Tort Claims Act (OTCA), the sole cause of
4 action for any tort of officers, employees, or agents of a public
5 body acting within the scope of employment or duties, and eligible
6 for representation and indemnification under Oregon Revised Statute
7 §§ (O.R.S.) 30.285 or 30.287, "shall be an action against the
8 public body only." O.R.S. 30.265(1). Once it is determined that
9 the individual defendants in this case are being sued in tort for
10 actions taken within the scope of their employment or duties, and
11 that they are eligible for representation and indemnification under
12 O.R.S. 30.285 or 30.287, substitution of the State of Oregon as the
13 sole defendant in the state tort claims, is appropriate.

14 Here, the First Amended Complaint does not allege that any of
15 the individual defendants acted outside of their official duties.
16 As described by plaintiff, all of the alleged acts by Mills,
17 Anderson, and Roberts took place within the scope of their
18 employment with the State of Oregon. Thus, they should be
19 dismissed as defendants from any state tort claims, and the State
20 of Oregon substituted as the sole defendant for those claims.

21 II. Eleventh Amendment

22 "The Eleventh Amendment bars suits against a state or its
23 agencies, regardless of the relief sought, unless the state
24 unequivocally consents to a waiver of its immunity." Yakama Indian
25 Nation v. State of Wash. Dep't of Revenue, 176 F.3d 1241, 1245 (9th
26 Cir. 1999). "Although the State of Oregon has consented to be sued
27 in Oregon courts for the torts committed by its employees,
28 officers, or agents while acting within the course and scope of

1 their employment under the OTCA, it has not consented to be sued in
 2 federal courts for those torts." Blair v. Toran, No. CV-99-956-ST,
 3 1999 WL 1270802, at *23 (D. Or. Dec. 2, 1999), aff'd, No. 00-35035,
 4 12 Fed. Appx. 604 (9th Cir. June 25, 2001).

5 Based on the Eleventh Amendment, all of plaintiff's state
 6 claims against the individually named defendants are barred
 7 because, as above, under the OTCA, the State of Oregon is
 8 substituted as the proper defendant in those claims and plaintiff
 9 may not sue the State of Oregon in federal court. Additionally,
 10 all claims against the Department, whether they be state or
 11 federal, and regardless of the nature of the requested relief, are
 12 barred.

13 Any federal claims against the individual defendants are not
 14 barred by the Eleventh Amendment because claims for damages under
 15 section 1983 are presumed to be brought against state officials in
 16 their individual capacities, Shoshone-Bannock Tribes v. Fish & Game
 17 Commission, 42 F.3d 1278, 1284 (9th Cir. 1994), and the Eleventh
 18 Amendment does not bar such claims. Price v. Akaka, 928 F.2d 824,
 19 828 (9th Cir. 1991); see also Kentucky v. Graham, 473 U.S. 159, 169
 20 (1985) (noting that the Eleventh Amendment bars suits for damages
 21 against state officials sued in their official capacity).²

22
 23 ² It is important to note that the capacity in which a
 24 defendant is sued is distinct from the capacity in which the
 25 defendant was acting when the alleged deprivation of rights
 26 occurred. Eastman v. Anderson, No. CV-08-3043-CL, 2009 WL
 27 1653111, at *5 (D. Or. June 10, 2009). Under section 1983, "a
 28 plaintiff may sue a state officer in his individual capacity for
 alleged wrongs committed by the officer in his official
 capacity." Id. Accordingly, suing the individual defendants in
 their individual capacities allows the federal section 1983
 damages claims to remain, but because the allegations address the

1 Additionally, any claims against the individual defendants for
2 prospective, injunctive relief are not barred by the Eleventh
3 Amendment. Independent Living Center of S. Cal., Inc. v.
4 Maxwell-Jolly, 572 F.3d 644, 660 (9th Cir. 2009) ("Although the
5 Eleventh Amendment expressly prohibits suits against states in both
6 law and equity, a plaintiff may nonetheless maintain a federal
7 action to compel a state official's prospective compliance with the
8 plaintiff's federal rights.").

9 III. Absolute Immunity

10 A. ALJ Mills

11 The caption of the First Amended Complaint indicates that
12 Mills is an ALJ. First Am. Compl. at p. 1. Plaintiff refers to
13 him as a referee employed by the Workers' Compensation Board. Id.
14 at p. 3. She later describes his role in conducting the hearings
15 and issuing the November 4, 2008 Opinion & Order. Id. at p. 5-6.
16 The Opinion & Order shows that Mills is an ALJ and that he authored
17 that decision. Attchmt 1 to Hallman Affid. at pp. 1-9.

18 "Absolute immunity is generally accorded to judges and
19 prosecutors functioning in their official capacities." Olsen v.
20 Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004).
21 "[C]ourts have extended the protections of absolute immunity to
22 qualifying state officials sued under 42 U.S.C. § 1983." Id. at
23 923. Absolute immunity may also extend to agency representatives
24 performing functions analogous to those of a prosecutor or a judge.
25 Id. "Such immunity assures the independent functioning of

26 _____
27 individuals acting in their official conduct, the State of Oregon
28 is properly substituted as the defendant in the state tort
claims.

1 executive officials acting in a quasi-judicial capacity, thereby
2 ensuring that they can exercise their adjudicative discretion
3 without fear of intimidation or harassment." Id.

4 To determine whether the protections of absolute immunity are
5 accorded to a state official, the court considers whether the
6 actions taken by the official are "functionally comparable" to that
7 of a judge or a prosecutor. Id. In Butz v. Economou, 438 U.S.
8 478, 512 (1978), the Supreme Court outlined the following factors
9 to analyze in determining whether the conduct at issue is
10 sufficiently judicial in nature and thus, entitled to absolute
11 immunity: (1) the need to assure that the individual can perform
12 his functions without harassment or intimidation; (2) the presence
13 of safeguards that reduce the need for private damages actions as
14 a means of controlling unconstitutional conduct; (3) the agency's
15 insulation from political influence; (4) the importance of
16 precedent; (5) the adversary nature of the process; and (6) the
17 correctability of error on appeal.

18 Here, all factors indicate that ALJ Mills is entitled to
19 absolute immunity for all of the conduct alleged in the First
20 Amended Complaint. See Mishler v. Clift, 191 F.3d 998, 1003 (9th
21 Cir. 1999) (explaining that Supreme Court, in Butz, held that
22 executive branch officials, when participating in a federal
23 administrative agency's adjudicative process, are entitled to
24 absolute immunity because they perform functions comparable to
25 those of judges and prosecutors); Yoonessi v. Albany Med. Ctr., 352
26 F. Supp. 2d 1096, 1099-1100 (C.D. Cal. 2005) ("If the official
27 functions as the equivalent of a judge or a prosecutor, the
28 official will likely be entitled to absolute immunity for any acts

1 committed in that role"; under factors in Butz, officials' alleged
2 acts of using and making false accusations in revoking plaintiff's
3 license to practice medicine, were entitled to absolute immunity).

4 B. Anderson

5 As with ALJ Mills, immunity protects Anderson from all of
6 plaintiff's allegations in the First Amended Complaint. The
7 Yoonessi court explained that "[a]n attorney in the Attorney
8 General's Office is immune from lawsuits for any action she commits
9 in discharging her litigation-related duties." Id. at 1103 (citing
10 Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001)). The
11 immunity extends to the assistant attorney general if sued as a
12 member of the Attorney General's Office or if sued individually for
13 conduct occurring during performance of official duties. Bly-
14 Magee, 236 F.3d at 1018.

15 As recognized in Olsen, the immunity enjoyed by prosecutors
16 for their official actions extends to executive officials and
17 agency representatives performing functions "analogous to those of
18 a prosecutor" in quasi-judicial settings. Olsen, 363 F.3d at 923.
19 Although conduct "wholly unrelated to or outside of [the
20 attorney's] official duties" is not immune from suit, all of
21 Anderson's alleged conduct relates to the performance of her
22 official duties.

23 C. Section 1983 Claim Based on Libel, Defamation,
24 & "False Swearing"

25 Defendants assert that they are entitled to absolute immunity
26 under section 1983 to the extent the claim is based on allegations
27 of libel, slander, or false swearing occurring as part of the
28 judicial proceeding. I agree. See Burns v. Reed, 500 U.S. 478,

1 489-92 (1991) (witnesses absolutely immune from damages liability
2 for making false or defamatory statements in judicial proceedings;
3 immunity extends to any hearing before a tribunal which performs a
4 judicial function); Briscoe v. LaHue, 460 U.S. 325, 341-45 (1983)
5 (Congress, in enacting section 1983, did not abrogate common law
6 absolute immunity afforded to witnesses for alleged false testimony
7 in a judicial proceeding).

8 As stated above, all of the alleged conduct by Mills and
9 Anderson occurred as part of the judicial proceeding. Plaintiff's
10 allegations against Roberts are a bit less clear. The majority of
11 her allegations are that Roberts misrepresented material facts and
12 committed perjury and false swearing during the June 20, 2008
13 hearing. E.g., First Am. Compl. at pp. 7, 8, 10-11. However,
14 there are also allegations that Roberts allegedly misrepresented
15 facts, and failed to disclose facts, in his official inspection
16 report. Id. at pp. 11, 12. Plaintiff indicates that these facts
17 were pertinent to her representation of Murray & Sons at the
18 January 10, 2008, and June 20, 2008 hearings. Id. However,
19 plaintiff also states that she "boxed-in" Roberts during
20 questioning, revealing that he had "slanted facts" within his
21 report to hide the fact that he had been to four locations before
22 entering the work site when Oregon law requires that an inspector
23 enter the work site without delay. Id. at p. 11.

24 The immunity recognized in Burns and Briscoe does not extend
25 to Roberts's alleged conduct outside of the judicial process and
26 assuming, for the purposes of this immunity analysis only, that
27 these allegations about Roberts's misrepresentations in, or
28 omissions from, his report state some sort of section 1983 claim,

1 Roberts is not entitled to immunity for that particular conduct.

2 IV. Section 1983 Claims

3 The basis of plaintiff's federal claims is 42 U.S.C. § 1983.
4 To sustain a section 1983 claim, plaintiff must allege the
5 violation of a federal constitutional or statutory right, by a
6 person acting under color of state law. See, e.g., Caviness v.
7 Horizon Community Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir.
8 2010).

9 Plaintiff's First Amended Complaint is sprinkled with
10 references to alleged violations of the Oregon Constitution.
11 Violations of a state-created interest that reaches beyond the
12 guarantees of the United States Constitution law do not support a
13 section 1983 claim. Ove v. Gwinn, 264 F.3d 817, 824 (9th Cir.
14 2001) (plaintiffs' allegation that blood test violated state law
15 failed to state a federal constitutional violation); Picray v.
16 Sealock, 138 F.3d 767, 770 (9th Cir. 1998) (plaintiff's argument
17 that Oregon law did not authorize his arrest did not give rise to
18 a liberty interest beyond that protected by the Fourth Amendment).
19 Plaintiff fails to articulate any cognizable section 1983 claim
20 based on a violation of the Oregon Constitution and thus, any such
21 claims are dismissed.

22 Plaintiff also appears to assert that the proceedings on the
23 citation before an ALJ deprived her of her constitutional right to
24 a jury trial. The Seventh Amendment of the United States
25 Constitution provides that "[i]n Suits at common law, where the
26 value in controversy shall exceed twenty dollars, the right of
27 trial by jury shall be preserved[.]" U.S. Const. amend VII. The
28 Seventh Amendment "applies only to proceedings in courts of the

1 United States, and does not in any manner whatever govern or
2 regulate trials by jury in state courts, or the standards which
3 must be applied concerning the same." Minneapolis & St. Louis R.R.
4 Co. v. Bombolis, 241 U.S. 211, 217 (1916).

5 Moreover, in cases where "public rights" are litigated (that
6 is, "cases in which the Government sues in its sovereign capacity
7 to enforce public rights created by statutes within the power of
8 Congress to enact[,]") the Seventh Amendment "does not prohibit
9 Congress from assigning the factfinding function and initial
10 adjudication to an administrative forum with which the jury would
11 be incompatible." Atlas Roofing Co. v. Occupational Safety and
12 Health Review Comm'n, 430 U.S. 442, 450 (1977); see also Jackson
13 Water Works, Inc. v. Public Utilities Com'n of State of Cal., 793
14 F.2d 1090, 1096 (9th Cir. 1986) (noting that "Supreme Court has
15 recognized that the creation of administrative remedies may
16 properly eliminate rights that may have been available in the
17 judicial forum" and further noting that "seventh amendment did not
18 prevent Congress from creating rights and remedies by statute,
19 committing their enforcement to a tribunal other than a court, and
20 thereby eliminating factfinding by a jury. The seventh amendment
21 is no bar to the enforcement of new rights in a speedy and expert
22 tribunal."). Plaintiff has no cognizable claim based on a
23 deprivation of a right to a jury trial.

24 Plaintiff next asserts a violation of "separation of powers"
25 because Mills and Anderson are both employees of the executive
26 branch of state government. The constitutional principle that one
27 branch of government is prohibited from "encroaching on the central
28 prerogatives of another," is based in the structure of the

1 Constitution which "enumerates and separates the powers of the
2 three branches of Government," and is known as the separation of
3 powers. Miller v. French, 530 U.S. 327, 341 (2000). But, as the
4 Court explained in Atlas Roofing, the delegation of an adjudicative
5 function to the appropriate agency in a case involving "public
6 rights," does not violate the Constitution. Atlas Roofing, 430
7 U.S. at 450; see also Northern Pipeline Constr. Co. v. Marathon
8 Pipeline Co., 458 U.S. 50, 68-70 (1982) (matters involving public
9 rights can be delegated to administrative agencies for
10 determination).

11 Although the Supreme Court has suggested that the term "public
12 rights" may no longer be the touchstone for validating
13 Congressional delegations of adjudicatory authority to an agency,
14 see Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853-54
15 (1986) ("the public rights doctrine reflects simply a pragmatic
16 understanding that when Congress selects a quasi-judicial method of
17 resolving matters that could be conclusively determined by the
18 Executive and Legislative Branches, the danger of encroaching on
19 the judicial powers is less than when private rights, which are
20 normally within the purview of the judiciary, are relegated as an
21 initial matter to administrative adjudication") (internal quotation
22 omitted), plaintiff's allegations do not state a "separation of
23 powers" claim. First, the agency at issue here is a state agency,
24 not a federal one, and it was the Oregon Legislature, not the
25 United States Congress, that delegated the authority to adjudicate
26 the citation issued by Roberts. Thus, plaintiff's "separation of
27 powers" allegations, to the extent they state a claim at all, do
28 not implicate Article III of the United States Constitution which

1 addresses the federal judiciary. And, as noted above, claims based
2 on the Oregon Constitution are not properly brought under section
3 1983.

4 Second, Atlas Roofing itself involved the imposition of a
5 penalty fine by the federal Occupational Safety & Health
6 Administration. There, the plaintiff challenged the administrative
7 imposition of the fine, contending it violated its Seventh
8 Amendment right to a jury trial. The Court, as noted above,
9 rejected that argument. While the Court's opinion centers on the
10 Seventh Amendment, the Court repeatedly notes that the agency's
11 role, through its ALJ, as factfinder and adjudicator, was
12 constitutional. Thus, even if plaintiff here had been cited by a
13 federal agency and had a hearing before a federal ALJ, Atlas
14 Roofing indicates that the administrative adjudication of the
15 citation is constitutionally permissible.

16 Third, while plaintiff has a due process right to an impartial
17 tribunal, evidence of unconstitutional impartiality is found when
18 the decisionmaker derives "a direct, pecuniary interest from
19 decisions adverse to claimants," or "the decisionmaker was engaged
20 in both adjudicative and executive functions in violation of the
21 principle of separation of powers." Hammond v. Baldwin, 866 F.2d
22 172, 177 (6th Cir. 1989). Here, plaintiff makes no allegation that
23 Mills acted in an investigatory/executive function in addition to
24 adjudicating the dispute, and she makes no allegation that Mills
25 had any pecuniary interest in the outcome. Plaintiff fails to
26 state a cognizable "separation of powers" claim.

27 Plaintiff also repeatedly refers to "equal protection," but I
28 discern no cognizable equal protection claim in her First Amended

1 Complaint. Plaintiff's bare, conclusory assertions of an equal
2 protection violation are insufficient to state a claim. See
3 Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 742 (9th Cir. 2008)
4 (stating that conclusory allegations of law are insufficient to
5 defeat a motion to dismiss for failure to state a claim).

6 Additionally, plaintiff repeatedly refers to defamation. A
7 section 1983 claim based on allegations of defamation requires an
8 allegation of "defamation-plus," meaning "an allegation of injury
9 to a plaintiff's reputation from defamation accompanied by an
10 allegation of injury to a recognizable property or liberty
11 interest." Crowe v. County of San Diego, 593 F.3d 841, 879 (9th
12 Cir. 2010); see also Paul v. Davis, 424 U.S. 693, 701-02 (1976)
13 (damage to reputation alone is not actionable under § 1983 unless
14 accompanied by injury to "some more tangible interests"). As the
15 Crowe court recently explained, "[t]here are two ways to state a
16 cognizable § 1983 claim for defamation-plus: (1) allege that the
17 injury to reputation was inflicted in connection with a federally
18 protected right; or (2) allege that the injury to reputation caused
19 the denial of a federally protected right." Id. (internal
20 quotation omitted).

21 At this point, the only damages claim that has survived
22 defendants' dismissal arguments is a claim that Roberts allegedly
23 made misstatements in, or omitted facts from, his inspection report
24 and that somehow this interfered with plaintiff's preparation for
25 the hearing. If plaintiff can show that these allegations amount
26 to some sort of federal constitutional claim, and that this
27 constitutional deprivation then caused an injury to her reputation,
28 she may be able to state a defamation-plus section 1983 claim.

1 Finally, plaintiff also makes several references to
2 unspecified "due process" violations. As with the equal protection
3 assertions, such allegations fail to state a claim.

4 V. Rooker-Feldman³

5 Defendants argue that plaintiff's First Amended Complaint
6 should be dismissed under the Rooker-Feldman doctrine. Generally,
7 under Rooker-Feldman, a federal district court does not have
8 subject matter jurisdiction to hear a direct appeal from the final
9 judgment of a state court. Noel v. Hall, 341 F.3d 1148, 1154 (9th
10 Cir. 2003) (citing District of Columbia Court of Appeals v.
11 Feldman, 460 U.S. 462 (1983), Rooker v. Fidelity Trust Co., 263
12 U.S. 413 (1923)).

13 Under Oregon law, ALJ Mills's Opinion & Order is a final order
14 of the Worker's Compensation Board. Oregon Revised Statute §
15 (O.R.S.) 654.290(2)(b). Judicial review of such orders is as
16 provided in Oregon's Administrative Procedures Act (OR-APA).
17 O.R.S. 654.290(1), (2).

18 Under the OR-APA, a person adversely affected by an order is
19 entitled to judicial review of a final order. O.R.S. 183.480(1).
20 Jurisdiction is conferred upon the Oregon Court of Appeals by
21 filing a petition within sixty days after service of the order upon
22 which the petition is based. O.R.S. 183.482.

23 Here, ALJ Mill's Opinion & Order is the final order or
24 judgment in the case because Murray & Sons did not seek judicial
25

26 ³ I decline to address defendants' res judicata argument
27 because, as defendants themselves concede, the record for a full
28 analysis of the argument is incomplete. Defts' Mem. at p. 12
n.2.

1 review of the decision. Hallman Affid. at ¶ 4.⁴ Thus, ALJ Mills's
 2 decision is properly viewed as a final state court judgment for
 3 purposes of a Rooker-Feldman analysis. See Lawrence v. Board of
 4 Election Comm'rs of the City of Chicago, 524 F. Supp. 2d 1011, 1017
 5 (N.D. Ill. 2007) ("decisions by quasi-judicial administrative
 6 bodies acting in a judicial capacity may also come under the
 7 Rooker-Feldman rule") (citing Mitchell v. Fishbein, 377 F.3d 157,
 8 166-67 (2d Cir. 2004)).

9 "The clearest case for dismissal based on the Rooker-Feldman
 10 doctrine occurs when 'a federal plaintiff asserts as a legal wrong
 11 an allegedly erroneous decision by a state court, and seeks relief
 12 from a state court judgment based on that decision. . . .'"
 13 Henrichs v. Valley View Dev., 474 F.3d 609, 613 (9th Cir. 2007)
 14 (quoting Noel, 341 F.3d at 1164). The doctrine bars lower federal
 15 courts "from exercising subject matter jurisdiction over a suit
 16 that is a de facto appeal from a state court judgment." Reusser v.
 17 Wachovia Bank, N.A., 525 F.3d 855, 859 (9th Cir. 2008) (internal
 18 quotation omitted).

19 An action brought in federal court constitutes such an appeal
 20 if "claims raised in the federal court action are 'inextricably
 21 intertwined' with [a] state court's decision such that the
 22 adjudication of the federal claims would undercut the state ruling
 23 _____

24 ⁴ Because an argument based on Rooker-Feldman goes to the
 25 court's subject matter jurisdiction, Noel, 341 F.3d at 1164
 26 ("Rooker-Feldman bars subject matter jurisdiction in federal
 27 district court"), I may consider evidence outside the pleadings.
 28 Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996) (a
 challenge to the court's subject matter jurisdiction under Rule
 12(b)(1) may rely on affidavits or any other evidence properly
 before the court).

1 or require the district court to interpret the application of state
2 laws or procedural rules." Id. (internal quotation omitted). In
3 essence, the Rooker-Feldman doctrine provides that "a party losing
4 in state court is barred from seeking what in substance would be
5 appellate review of the state judgment in a United States district
6 court, based on the losing party's claim that the state judgment
7 itself violates the loser's federal rights." Johnson v. De Grandy,
8 512 U.S. 997, 1005-1006 (1994).

9 Remaining in the case at this point are plaintiff's two claims
10 for injunctive relief in which she seeks an order requiring
11 defendants to remove ALJ Mills's Opinion & Order from public view,
12 and an order requiring defendants to remove "all described
13 passages" from any public record held by the State of Oregon,
14 including a "CDR recording."

15 It is important to distinguish the claims Rooker-Feldman
16 precludes from those it does not. As Noel explained:

17 If a federal plaintiff asserts as a legal wrong an
18 allegedly erroneous decision by a state court, and seeks
19 relief from a state court judgment based on that
20 decision, Rooker-Feldman bars subject matter jurisdiction
21 in federal district court. If, on the other hand, a
22 federal plaintiff asserts as a legal wrong an allegedly
23 illegal act or omission by an adverse party,
24 Rooker-Feldman does not bar jurisdiction.

25 Noel, 341 F.3d at 1164.

26 Here, Rooker-Feldman applies to plaintiff's claims for
27 injunctive relief because in those claims she seeks to expunge the
28 state court "judgment" itself by seeking removal of ALJ Mills's
November 4, 2008 Order & Opinion from public records, or the
transcript or tape recording of the hearings upon which his order
is based. The gravamen of the injunctive relief claims is that the

1 November 4, 2008 Opinion & Order was wrongly issued and/or that the
2 contested hearing was somehow conducted improperly. These are not
3 claims of independent injury which a state tribunal failed to
4 remedy. Rather, these claims seek to undo the state decision
5 because of an injury inflicted by the state decision itself. See
6 Lopez v. Kennedy, No. CV-08-706-PK, 2008 WL 5245354, at *4 (D. Or.
7 Dec. 16, 2008) (Rooker-Feldman required dismissal of the
8 plaintiff's claims that a stalking order against the plaintiff was
9 wrongly issued, that the state proceedings were improperly
10 instituted in the first instance, and/or that the state proceedings
11 were conducted improperly).

12 Also remaining is a possible claim for damages for Roberts's
13 alleged misstatement, or omission, of information from his
14 inspection report. This claim is also precluded by Rooker-Feldman.
15 As noted above, claims that are inextricably intertwined with the
16 state agency's decision are subject to Rooker-Feldman. Reusser,
17 525 F.3d at 859. The allegations in support of this claim, to the
18 extent they can be discerned from the First Amended Complaint at
19 all, are that Roberts allegedly made misstatements in his
20 inspection report, or omitted information from that report, and
21 that this information was relevant to plaintiff in her hearing
22 preparation. First Am. Compl. at pp. 11-12. The First Amended
23 Complaint further suggests that plaintiff was able to discover the
24 alleged misstatements and omissions after "boxing-in" Roberts
25 during the hearing. Id. at p. 11.

26 Because the inspection report was the foundation for the
27 hearing, and the alleged misstatements and omissions were the
28 subject of testimony at the hearing, as clearly revealed in the

1 First Amended Complaint, any allegations regarding the alleged
2 misstatements and omissions are inextricably intertwined with ALJ
3 Mills's decision and thus, any alleged injury suffered by plaintiff
4 is a result of ALJ Mills's decision, not as a result of any
5 independently occurring harm. Even if examined as a defamation-
6 plus type claim, the harm resulting from these allegations, to the
7 extent they support a section 1983 claim at all, is from the
8 penalty imposed by ALJ Mills in his decision and thus, the claim is
9 a de facto attack on the state court decision which is not a claim
10 over which this Court has jurisdiction. The injunctive relief
11 claims and any remaining claim against Roberts based on his
12 inspection report, should be dismissed pursuant to Rooker-Feldman.

13 VI. Amendment

14 Defendants initially filed a motion to dismiss plaintiff's
15 original Complaint, raising the same arguments raised in the
16 instant motion. In response to defendants' first motion to
17 dismiss, plaintiff filed her First Amended Complaint, which she was
18 entitled to do as of right and without agreement by defendants or
19 leave of court.

20 Upon the filing of the First Amended Complaint, the first
21 motion to dismiss was denied as moot. In response to the First
22 Amended Complaint, defendants filed the instant motion to dismiss.

23 Plaintiff now seeks leave to file a Second Amended Complaint.
24 I recommend that the motion be denied.

25 Although leave to amend should be "freely given when justice
26 so requires[,]" Federal Rule of Civil Procedure 15(a), any
27 amendment here would be futile. Given the discussion above on the
28 Eleventh Amendment, the various immunities, and Rooker-Feldman, the

1 deficiencies in the First Amended Complaint cannot be overcome by
2 amendment. Additionally, plaintiff was already aware of these
3 arguments when she filed her First Amended Complaint which failed
4 to change any claims or allegations in a way to avoid dismissal.
5 Her proposed Second Amended Complaint adds new defendants which
6 would be dismissed based on the Eleventh Amendment (the Workers'
7 Compensation Board as an entity, the Oregon Department of Justice,
8 and OR-OSHA), as well as the Director of the Department Cory
9 Streisinger who would be subject to dismissal because there are no
10 allegations of personal involvement by Streisinger. E.g., Avalos
11 v. Baca, 596 F.3d 583, 594 (9th Cir. 2010) (section 1983 claim
12 properly dismissed when plaintiff failed to allege personal
13 involvement by individual officers). Plaintiff also continues to
14 name ALJ Mills and Anderson as defendants, despite being on notice
15 that immunity protects them from the claims as alleged.
16 Additionally, the proposed Second Amended Complaint is replete with
17 inappropriate legal argument.

18 I recommend that defendants' motion to dismiss be granted and
19 that the First Amended Complaint be dismissed, with prejudice
20 because no amendment can effectively cure the deficiencies. I
21 further recommend that plaintiff's motion to file a Second Amended
22 Complaint be denied.

23 VII. Attorney's Fees

24 Defendants request attorney's fees under 42 U.S.C. § 1988(b),
25 under which the court, in its discretion, may allow the prevailing
26 party, other than the United States, reasonable attorney's fees.
27 However, a prevailing defendant is entitled to attorney's fees
28 under section 1988(b) only when "the plaintiff's claims are

1 groundless, without foundation, frivolous, or unreasonable." Karam
2 v. City of Burbank, 352 F.3d 1188, 1195 (9th Cir. 2003) (internal
3 quotation omitted).

4 Defendants argue that the Court should award them fees because
5 plaintiff has continued to present the same claims against the same
6 defendants as in her original Complaint, even after receiving
7 defendants' first motion to dismiss. Particularly, defendants note
8 that plaintiff named ALJ Mills and Anderson in her First Amended
9 Complaint after defendants' first motion to dismiss clearly
10 demonstrated, according to defendants, that they had immunity based
11 on their respective roles in the proceedings. Counsel for
12 defendants apparently advised plaintiff that if she did not dismiss
13 ALJ Mills and Anderson from the First Amended Complaint, defendants
14 would seek attorney's fees.

15 I decline to recommend an award attorney's fees to defendants.
16 While plaintiff's claims do not survive a motion to dismiss, the
17 recommended ruling herein is based on a number of legal theories,
18 some of which, such as the Eleventh Amendment and Rooker-Feldman,
19 are challenging to understand and apply even for many attorneys.
20 The more straightforward immunity arguments may be more easily
21 understood by a layperson. Nonetheless, given that defendants'
22 motion seeking to dismiss the First Amended Complaint was almost
23 identical to their original motion to dismiss, I do not view
24 plaintiff's refusal to drop ALJ Mills and Anderson after receiving
25 the first motion to dismiss, as having been especially burdensome
26 to defendants.

27 CONCLUSION

28 Defendants' motion to dismiss (#35) should be granted and this

1 action should be dismissed with prejudice. Plaintiff's motion to
2 amend (#45) should be denied.

3 SCHEDULING ORDER

4 The Findings and Recommendation will be referred to a district
5 judge. Objections, if any, are due August 30, 2010. If no
6 objections are filed, then the Findings and Recommendation will go
7 under advisement on that date.

8 If objections are filed, then a response is due September 16,
9 2010. When the response is due or filed, whichever date is
10 earlier, the Findings and Recommendation will go under advisement.

11 IT IS SO ORDERED.

12 Dated this 12th day of August, 2010.

13
14 /s/ Dennis J. Hubel

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16 Dennis James Hubel
17 United States Magistrate Judge
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